Supreme Court of the United States.

OCTOBER TERM, ~~1961~~. 62

No. 3~~~~
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LENORE FOMAN,
Petitioner,

v.

ELVIRA A. DAVIS, EXECUTRIX,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Opinions Below.

The opinion of the Court of Appeals is reported in 292 F. (2d) 85, and the opinion of said Court on the Petition for Rehearing is reported in 292 F. (2d) 88.

Counter-Statement of Questions Involved.

1. Whether an appeal to the Court of Appeals is a nullity and properly dismissed as premature if taken from a District Court judgment as to which there is an outstanding motion to vacate and to amend made within ten days of entry of the judgment.

2. In the case of a District Court's denial after judgment of motions which in substance are for leave to amend a complaint, whether an appeal from such denial is sufficient to bring the judgment itself before the Court of Appeals.

3. Whether the District Court abused its discretion in denying a motion to vacate judgment to permit amendment, and a motion to amend the complaint by adding a count, after the action had been dismissed.

4. Whether in the decision of the Court of Appeals there was any departure from or conflict with decisions of other Courts of Appeals or of this Court.

Counter-Statement of the Case.

The complaint in this action alleges an oral agreement "at or about 1947" (R. 2-3) between the petitioner and her father, the decedent, Wilbur W. Davis, whereby the petitioner agreed to assume and pay all expenses for the care, treatment and maintenance of her mother, decedent's first wife, and to look after and care for her as long as she lived, and the decedent, in consideration therefor, agreed to make and leave no will, to the end that the petitioner, as his only child, would receive the share of his estate to which she would be entitled under the intestacy laws of Massachusetts.

The complaint further alleges that the petitioner performed her part of the agreement until the death of her mother in 1953; that in 1957 the decedent married the respondent, Elvira A Davis; that Wilbur W. Davis died in 1959, leaving an estate of approximately $60,000 and a will which has been duly probated in Massachusetts and of which the respondent is executrix.

Except for a bequest of $5,000 to his brother, the decedent by the terms of his will "demised and bequeathed"

(R. 4) his entire estate to the respondent. The petitioner seeks damages in the amount of $40,000, the share of the estate which she would have received as his only child if Wilbur W. Davis had died intestate.

Respondent moved to dismiss in the District Court (R. 7) and, after hearing, judgment was entered on December 19, 1960, dismissing the complaint (R. 10) in accordance with a memorandum of decision which had been previously filed (R. 7).

On December 20, 1960, the petitioner moved to vacate judgment "in order to permit [her] to file a Motion to Amend her Complaint by adding a second cause of action" (R. 10). On the same date the petitioner also moved to amend her complaint in accordance with an amendment simultaneously proposed (R. 11-12). The proposed amendment, entitled "Second Cause of Action," alleged that the petitioner paid money and rendered services for and on behalf of the respondent, Elvira A. Davis.

The petitioner then filed, on January 17, 1961, notice of appeal to the Court of Appeals from the judgment of December 19, 1960 (P. 36). Later, on January 23, 1961, there was a hearing on petitioner's motions to vacate judgment and to amend her complaint, and both motions were denied that day (R. 2). On January 26, 1961, the petitioner filed a notice of appeal from the denial of her motions (P. 36).

On June 26, 1961, the Court of Appeals dismissed the appeal insofar as taken from the District Court's judgment of December 19, 1960, and affirmed the orders of the District Court of January 23, 1961 (P. 30-32). On August 17, 1961, a petition for rehearing was denied by the Court of Appeals (P. 33-35).

Petition for writ of certiorari was filed in this Court on November 14, 1961.

Jurisdiction in the District Court was based entirely on diversity of citizenship (R. 2). The question involved on respondent's motion to dismiss, on which the District Court entered judgment for the respondent, was wholly a question of Massachusetts law, namely whether an oral agreement to make and leave no will is enforceable or binding under the law of the Commonwealth of Massachusetts. The Massachusetts court has never had occasion to decide the question specifically. The principal authority adduced by the petitioner was *Cleaves v. Kenney*, 63 F. (2d) 682, decided by a divided court in 1933 by the Circuit Court of Appeals for the First Circuit.

Argument.

I. Under the Federal Rules of Civil Procedure, Petitioner's Motion to Vacate Judgment having been Made within Ten Days of Entry of Judgment and Not being Disposed of when Appeal from the Judgment was Taken, that Appeal was a Nullity and Properly Dismissed as Premature.

Petitioner argues that the Court of Appeals should have treated her motion to vacate judgment as having been brought under Rule 60, so that then the notice of appeal filed January 17, 1961, would not have been premature and the Court of Appeals would have reached the merits of the judgment entered by the District Court (P. 8).

In making that contention petitioner is evidently oblivious of its implications. If petitioner's motion to vacate had been treated as brought under Rule 60, thereby leaving the finality of the judgment unaffected, the appeal taken on January 17, 1961, would have been rendered effectual, but at the same time the District Court would

have been deprived of jurisdiction to entertain petitioner's motion to vacate the judgment.

Daniels v. *Goldberg*, 8 F.R.D. 580 (D.C. S.D. N.Y. 1949); affd. 173 F. (2d) 911 (C.A. 2d Cir. 1949).

Switzer v. *Marzall*, 95 F. Supp. 721, 722-723 (D.C. D.C. 1951).

United States v. *Frank B. Killian Co.*, 269 F. (2d) 491, 494 (C.A. 6th Cir. 1959).

That posture of affairs would no more have suited the petitioner than the present situation.

Indeed, a manifest purpose of Rule 73, in suspending the finality of a judgment upon a timely motion under Rule 59, was to spare the petitioner and all other litigants from the dilemma of having to choose between the prosecution of an appeal and the prosecution of motions brought after judgment but not disposed of as the appeal period is about to expire.

See *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177-178 (1944), referred to in Report of Proposed Amendments Prepared by the Advisory Committee on Rules for Civil Procedure, June, 1946, House Document No. 473, 80th Congress, 1st Session, p. 139; *Stevens* v. *Tuttle*, 222 F. (2d) 352 (C.A. 7th Cir. 1955); and *Gaudiosi* v. *Mellon*, 269 F. (2d) 873, 877 (C.A. 3d Cir. 1959), cert. den. 361 U.S. 902 (1959).

Petitioner is, of course, correct in saying that procedure should not be made into a "game" (P. 7). But, in the case at bar, to have treated petitioner's motion to vacate

under Rule 60 rather than Rule 59 would have been to subvert the very system of appeals and post-judgment motions so carefully created by Rules 59, 60 and 73.

From the foregoing we see why there can be no quarrel with the view of the Court of Appeals that "the full context of the rules dictates that resort should be made to the procedure under Rule 59 if time for applying for such motions has not expired" (P. 32).

The finality of the judgment having been suspended by the motion to vacate and that motion not having been disposed of by the District Court when the appeal was taken on January 17, 1961, the appeal was properly dismissed as premature and a nullity.

United States v. *Crescent Amusement Co.*, 323 U.S. 173, 177 (1944).

Gaudiosi v. *Mellon*, 269 F. (2d) 873, 877 (C.A. 3d Cir. 1959); cert. den. 361 U.S. 902 (1959).

Stevens v. *Turner*, 222 F. (2d) 352 (C.A. 7th Cir. 1955).

Kelly v. *Pennsylvania Railroad Co.*, 228 F. (2d) 727 (C.A. 3d Cir. 1955); cert. den. 351 U.S. 925 (1956).

II. By Any Reasonable Standard, the Appeal Taken by Petitioner from the Post-Judgment Orders of the District Court was Insufficient to Bring the Judgment Itself before the Court of Appeals.

Certain provisions of the statutes and rules require consideration at this point.

Section 1291 of Title 28 of the United States Code provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

Section 2107 of Title 28 provides:

> "... No appeal shall bring any judgment ... before a court of appeals for review unless notice of appeal is filed, within thirty days after entry of such judgment. ..."

Rule 73 (a) of the Federal Rules of Civil Procedure provides:

> "A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal."

Rule 73 (b) provides:

> "The notice of appeal ... shall designate the judgment or part thereof appealed from. ..."

A. In the foregoing provisions of the statutes and rules is described an objective system for the orderly prosecution of appeals.

It is a system premised, first of all, upon the existence of a "final" decision or judgment. As pointed out above (I, *supra*), an appeal taken from a judgment before the judgment has become final is premature and must be dismissed as a nullity.

Beyond the requirement that there be a final decision or judgment, there must be a timely notice of appeal which designates the judgment or part thereof from which appeal is being taken.

In the case at bar the notice of appeal filed January 26, 1961, by the petitioner designated only the orders of the District Court made on January 23, 1961, denying her motion to vacate judgment and to amend her complaint. The motion to vacate judgment was explicitly "in order to permit the plaintiff to file a Motion to Amend her Complaint by adding a second cause of action . . . in accordance with [the] Motion herewith filed" (R. 10).

Viewed as a notice of appeal for the purpose of taking an appeal from the judgment of December 19, 1960, the notice of appeal of January 26, 1961, is patently deficient as a matter of substance.

> *Carter* v. *Powell*, 104 F. (2d) 428, 430 (C.A. 5th Cir. 1939); cert. den. 308 U.S. 611 (1939).
> *Gannon* v. *American Airlines, Inc.*, 251 F. (2d) 476, 482 (C.A. 10th Cir. 1957).

To make up for that deficiency in substance as the petitioner suggests, by means of a transfusion from the ghost of an abortive appeal, does not appear to be the way to sound judicial administration.

We are not dealing here with "one of those technicalities to be easily scorned" (*Radio Station WOW, Inc.*, v. *Johnson*, 326 U.S. 120, 124 (1945)). Regarded as a matter involving nothing more than an application of rules, the Court of Appeals was at least within its discretion under Rule 73 (a) to take, on its own initiative, the action which in this instance it deemed appropriate, namely, limiting the effect of the notice of appeal filed January 26, 1961, as an appeal only from the orders therein designated.

> *Federal Deposit Insurance Corp.* v. *Congregation Poiley Tzedeck*, 159 F. (2d) 163, 166 (C.A. 2d Cir. 1946).

See *Georgia Hardwood Lumber Co.* v. *Compania de Navegacion Transmar, S.A.*, 323 U.S. 334, 336 (1945).

B. In truth, the case at bar involves more than an application of rules. The notice of appeals filed January 26, 1961, actually limited the jurisdiction of the Court of Appeals to a review of the orders of January 23, 1961.

Donovan v. *Esso Shipping Co.*, 259 F. (2d) 65 (C.A. 3d Cir. 1958); cert. den. 359 U.S. 907 (1959).

To have given that notice of appeal any wider effect would have enlarged the scope of the review and so would have been a step clearly beyond the discretion which the Court of Appeals has to disregard procedural irregularity of no substance.

Reconstruction Finance Corp. v. *Prudence Securities Advisory Group*, 311 U.S. 579, 582-583 (1941).

Georgia Hardwood Lumber Co. v. *Compania de Navegacion Transmar, S.A.*, 323 U.S. 334, 336 (1945).

A Court of Appeals must, of course, always satisfy itself as to its jurisdiction even though the matter is not raised by either of the parties.

Canadian Indemnity Co. v. *Republic Indemnity Co.*, 222 F. (2d) 601 (C.A. 9th Cir. 1955).

7 Moore, Federal Practice, ¶ 73.09[6], n. 3 (2d ed. 1954).

C. We come now to the question whether or not the notice of appeal of January 26, 1961, limited as an appeal from the orders of January 23, 1961, could in any way carry back to the judgment of December 19, 1960, any errors which the motions affected by those orders sought to rectify. In a review of the orders of January 23, 1961, what, if anything, would be involved which was also involved in the judgment?

As the Court of Appeals itself pointed out in its opinion on the petition for rehearing (292 F. (2d) 88), the petitioner's motion to vacate did not ask reconsideration comparable to the reconsideration implicit in a motion for a new trial. Petitioner moved, in substance, for leave to amend her complaint by adding a "Second Cause of Action." Such a motion being predicated on the assumption that the dismissal of the original cause of action was correct, the Court of Appeals was right in saying (292 F. (2d) 88):

> "Any error involved in the denial of this motion for leave to amend could relate back in no way to errors which entered into and infected the original judgment."

D. In her petition (P. 12), petitioner says:

> "We do not argue in favor of resort to a pleader's intention—indeed, we argue that all such nebulous desiderata give way to the basic and essential principles of federal procedure."

Even though we would not entirely abandon the element of intent, so ably expressed by the Court of Appeals in its opinion on the petition for rehearing (292 F. (2d)

88), we submit that the foregoing analysis is worked out in accordance with the standards which petitioner seems to regard as desirable.

III. Denial of Petitioner's Motion to Vacate Judgment so as to Permit her to Amend her Complaint, and Denial of her Motion to Amend her Complaint, were Proper.

A. In her petition (P. 18-24), petitioner makes an extended argument to the effect that an amendment to her original complaint was really unnecessary as a matter of law, notwithstanding her efforts to amend, because damages in quantum meruit are recoverable in an action for breach of contract. She makes this argument in criticism of the affirmation by the Court of Appeals of the orders of the District Court denying her motion to vacate judgment so as to permit her to amend her complaint and also denying her motion to amend.

Whatever the merit or lack of merit of this argument in the abstract, its only pertinence to the propriety of the District Court's orders on the motions in question is to point out that they were essentially innocuous, the gist of petitioner's grievance relating truly to the District Court's dismissal of her complaint.

The reference of the Court of Appeals to the motions to vacate and amend as attempting to set up "an independent matter" was made only in respect to the issue of whether petitioner's appeal from their denial could be considered to relate back in any way to any errors which may have entered into or "infected" the original judgment of the District Court (292 F. (2d) 88).

Petitioner's extended argument on this point can be taken to be no more than a poorly concealed effort to show

this Court what she would now like to argue to the Court of Appeals if given the chance.

B. As in her brief in the Court of Appeals, petitioner in her petition in this Court persists in the argument that due liberality was denied her in the matter of amending her complaint, particularly in view of *Cleaves* v. *Kenney*, 63 F. (2d) 682 (C.A. 1st Cir. 1933).

It must be remembered in this connection that, although *Cleaves* v. *Kenney* is on the books, the Massachusetts court has never had occasion to decide a case specifically involving the enforceability under Massachusetts law of any oral agreement to die intestate.

Against that background it should be readily apparent that petitioner made a conscious choice in framing her complaint exclusively as an action on the alleged agreement rather than as both an action on the agreement and an action in quantum meruit.

This choice involved an obvious risk, not only of the ever-present possibility that the law was not as petitioner conceived it to be, but, more fundamentally, the risk that she might be barred from later commencing a new action by Massachusetts General Laws (Ter. Ed.) chapter 197, section 9, which requires an action against an executor to be commenced within a year from his giving bond (see R. 2).

Petitioner's choice, indeed, can be said to have been a deliberate and calculated choice, in which she carefully selected the federal forum for the intended purpose of exploiting what she considered to be a fortuitous opportunity and in which she eschewed a count in quantum meruit in favor of a bold attack.

It is not a matter of justice, least of all in the case of a claim of the nature here presented, to relieve the petitioner

of the consequences of a conscious, deliberate, calculated, free choice which hindsight has indicated was wrong.

C. A reading of the "Second Cause of Action" proposed by petitioner in her motion to amend her complaint (R. 11-12) will disclose at once that it fails completely to allege any action which relates to the allegations in the original complaint (R. 2-4). The original complaint, it will be recalled, claims damages for breach of contract from the estate of Wilbur W. Davis on the ground that the petitioner, *for and on behalf of Wilbur W. Davis*, provided and paid for care and maintenance of his first wife in consideration of his alleged promise, later unfulfilled, to die without making a will. In contrast, the proposed "Second Cause of Action" alleges that the petitioner paid money and rendered services *for and on behalf of Elvira A. Davis*, the executrix of the will of Wilbur W. Davis. Obviously, allowance of the petitioner's motion to amend would not have enabled her to recover for any money or services she may have ever paid or rendered for or on behalf of Wilbur W. Davis.

See *Shopneck* v. *Rosenbloom*, 326 Mass. 81, 82.
Turner v. *White*, 329 Mass. 549, 553.

IV. There is No Departure from or Conflict with Decisions of This Court or with Decisions of Other Courts of Appeals.

Intersticially in her petition, the petitioner has introduced the idea that in the case at bar there are grave departures from or conflicts with decisions of this Court and with decisions of other Courts of Appeals. We sincerely believe that such is not the situation and that valid dis-

tinctions are readily discovered and the various decisions easily reconciled.

Conclusion.

On the basis of the foregoing argument it is respectfully submitted that there are no special and important reasons for a review of the case at bar on writ of certiorari and that the petition should therefore be denied.

Respectfully submitted,

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